

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DEBRA WINSTON**

Claimant

VS.

**GENESIS HEALTH CLUBS MGMT., INC.**

Respondent

AND

**ACCIDENT FUND INS. CO. OF AMERICA**

Insurance Carrier

Docket No. **1,032,755**

**ORDER**

Respondent and its insurance carrier request review of the July 24, 2007 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

The Administrative Law Judge (ALJ) ordered respondent to pay temporary total disability compensation beginning December 1, 2006, and continuing until claimant is released to substantial and gainful employment.

The respondent requests review of whether the ALJ exceeded her authority by granting temporary total disability benefits while claimant was employed from May 20 through May 29, 2007. Respondent argues claimant is not entitled to temporary total disability benefits during those nine days she was employed and therefore the ALJ's order should be amended to exempt payment of temporary total disability benefits for claimant's nine days of employment in May 2007. Claimant argues she is entitled to temporary total disability benefits from December 1, 2006, and continuing through the current date except for those nine days.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant performed janitorial work for respondent. In the early part of October 2006, claimant was having pain in her arm. On October 31, 2006, claimant talked to Rodney Stevens about her arm hurting. She sought treatment with her family physician, Dr. Matthew Johnson. The doctor ordered x-rays and an MRI. Dr. Johnson then referred claimant to Dr. Robert L. Eyster. Dr. Eyster recommended physical therapy and placed restrictions on the claimant of no lifting, pushing, pulling greater than 5 pounds. Claimant continued working. Claimant was terminated on December 6, 2006, but received payment through December 1, 2006.

From May 20<sup>th</sup> through May 29, 2006, claimant worked for a temporary agency, Spherion and apparently was placed in a job where she opened containers and then disposed of them. Claimant had a doctor's appointment with Dr. Do on May 29, 2006, and the doctor placed restrictions on the claimant of no lifting greater than 51 pounds, no work above shoulder level, no work greater than 18 inches from body and weight limit of 10 pounds for two-handed lifts. Claimant's job was terminated due to those restrictions. Dr. Do performed surgery on claimant's shoulder on July 9, 2007.

At the preliminary hearing on July 24, 2007, claimant's attorney was requesting temporary total disability benefits from December 1, 2006 through the date of the preliminary hearing except for the 9 days claimant testified that she had worked.<sup>1</sup>

The only issue raised on review by respondent is whether the ALJ erred in awarding temporary total disability compensation for the nine days that it was undisputed claimant engaged in substantial gainful employment. The claimant agrees that she is not entitled to temporary total disability compensation for those nine days and at preliminary hearing specifically noted that she was not requesting temporary total disability compensation for those days.

As both parties, in their briefs to the Board, agree claimant is not entitled to temporary total disability compensation for the 9 days it is troublesome that this matter was not resolved by the parties at least requesting the ALJ to issue an Order Nunc Pro Tunc or if that was not appropriate by submitting an amended Agreed Order to the ALJ reducing the payment of temporary total disability compensation for the 9 days claimant was engaged in substantial gainful employment.

This is an appeal from a preliminary hearing. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;

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<sup>1</sup> P.H. Trans. at 26.

- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>2</sup>

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>3</sup>

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, the ALJ did not exceed her jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>5</sup>

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<sup>2</sup> See K.S.A. 44-551.

<sup>3</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>4</sup> K.S.A. 44-534a.

<sup>5</sup> K.S.A. 2006 Supp. 44-555c(k).

**WHEREFORE**, it is the finding of this Board Member that the respondent's request for review of Administrative Law Judge Nelsonna Potts Barnes' Order dated July 24, 2007, is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2007.

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BOARD MEMBER

c: James R. Roth, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge